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IN THE

Supreme Court of the United States

October Term, 1975
Nos. 75-588, 75-592, 75-705

STATE OF WASHINGTON, et al., *Petitioners,*
v.
UNITED STATES OF AMERICA, QUINAULT TRIBE OF INDIANS, et al., *Respondents,*
and
NORTHWEST STEELHEADER COUNCIL OF TROUT UNLIMITED, *Petitioners,*
v.
UNITED STATES OF AMERICA, QUINAULT TRIBE OF INDIANS, et al.,
and
WASHINGTON REEF NET OWNERS ASSOCIATION, et. al., *Petitioner,*
v.
UNITED STATES OF AMERICA, et al., *Respondents.*

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT—FILED ON BEHALF OF PURSE SEINE VESSEL OWNERS ASSOCIATION, PUGET SOUND GILL NETTERS ASSOCIATION, WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, WASHINGTON KELPERS ASSOCIATION, NORTHWEST FISHERIES ASSOCIATION AND WEST COAST TROLLERS ASSOCIATION

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BASIS FOR FILING OF *AMICI CURIAE* BRIEF

This *amici curiae* brief is filed pursuant to Supreme Court Rule 42 and the unanimous consent of all of the parties. The written consents have been filed with this Court.

INTEREST OF *AMICI CURIAE*

Amici curiae are associations of commercial fishermen, vessel owners and processors. Their members fish all waters encompassed by the case area and take all species of sal-

mon which are involved in this case. Combined, their members catch over 90% of the commercial salmon taken by non-Indians in the case area. They employ every method of commercial fishing except reef nets. These include purse seining, gill netting, trolling, onshore trolling, or "kelping", and commercial operation of sport fishing charter boats. Their investment in vessels alone is estimated at more than $150,000,000.00.

Although the economic impact of this decision falls almost entirely on *amici curiae* and its members, they were not parties and those who sought to intervene were denied the right to do so, and continue to be denied the right to intervene under the district court's "continuing jurisdiction".[1] By comparison, the district court has permitted intervention by every Indian tribe that requested the right to do so.

Amici curiae were permitted to appear as *amici curiae* before the Court of Appeals for the Ninth Circuit.

REASONS FOR SUPPORT

1.

Neither the District Court Decision Nor the Circuit Court Decision Are Supportable by the Authorities, Treaty Language, Findings of Fact, or Logic

The different Stevens treaties all utilized approximately the same language:

---

1. A group represented by the Washington Reef Netters Owners Association had been permitted to intervene by another district court judge. However, its fishing is limited to a small area of northern Puget Sound and use of stationary gear. Much of that group's concern is a factual issue unique to them: whether present reef net sites and gear are different from Indian reef net sites in treaty times. Purse seiners, gill netters, trollers, "kelpers", charter-boat operators and processors were not parties to the case below.

> "The *right of taking* fish, *at all usual and accustomed grounds and stations*, is further secured to said Indians, *in common with all citizens*. . . ." (Emphasis supplied)

Except for these reserved rights, the Indians ceded sovereignty over all lands and waters outside their reservations. They reserved no rights to fish other than at their "usual and accustomed grounds and stations", agreed that non-Indians could fish in common with them at their usual and accustomed fishing grounds and placed no restrictions on the non-Indians' use of ceded lands and waters.

The district court expressly found that the Treaty Indians understood the restrictive nature of "usual grounds and stations" (F.F. 24, R. 1598), and further found that:

> ". . . the Indian's harvest of fish was subject to the vagaries of nature which occasionally imperiled their food supply and caused near starvation. The amounts of fish that could be harvested were particularly affected by run-size fluctuations caused by natural conditions and water conditions occurring at the time the fish were running, e.g., flooding, which limited the effectiveness of Indian fishing gear." (F.F. at 6, R. 1584)
>
> ". . . George Gibbs noted that:
>
> "'As regards the fisheries, they are held in common and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking. In fact, such a claim would be inconvenient to all parties, as the Indians move about, on the sound particularly, from one to another locality, according to the season.'" (F.F. at p. 10, R. 1588)
>
> ". . . The Indians were assured by Governor Stevens and the treaty commissioners that they would be allowed to fish, but the white man would also be allowed to fish . . ." (F.F. 20, p. 16, R. 1594)
>
> ". . . there is no evidence at the time of the treaties

> that either party intended to restrict the other party's fishing . . ." (F.F. 28, at p. 22, R. 1600)

Conversely, there was no finding whatsoever that there was any Indian cultural concept or understanding of being entitled to own or catch any fixed quantum or proportion of fish.

Notwithstanding, the district court ruled, as a matter of law, that the words "in common with" gave the Indians an inheritable right to catch 50% of the harvestable fish. The only basis for this ruling, other than a reference to treaty interpretation rules which enjoin liberality, and the only legal precedent ever cited by the court or the plaintiffs for this startling interpretation of the treaty words "in common with" is a definition of the word "common" from 1828 and 1862 editions of Webster's American Dictionary of the English Language (F.F. 24, p. 19, R. 1597). The full language of this definition reads:

> "1. 1. *Belonging equally to more than one, or to many indefinitely*; as life and sense are common to man and beast; *the common privileges of citizens*; the common wants of man. 2. *Belonging to the public*; *having no separate owner*. The right of a highway is common. 3. General; serving for the use of all . . ." 1828 ed. Webster's American Dictionary of the English language.
>
> (Emphasis supplied)

The first point to remember therefore is that the extraordinary innovations in the decisions and orders below were basically contrived from this dictionary definition without the benefit of any direct legal precedent.

It is to be noted that plaintiffs (respondents before this Court) constantly refer to the district court's decision as giving the Treaty Indians not 50% of the fish but merely

the opportunity to catch up to 50% of the fish. This is a distinction with no difference because the court's decree provides that the non-Indian fishing activity must be cut back until the Indian quota is taken. The quotas are determined by counting the fish caught. As the modern non-Indian fishery is a predominantly marine fishery and as salmon in the case area are mostly taken while migrating towards terminal areas, any closure of the marine fishery means that the salmon are permanently lost to the non-Indian fishermen.

Furthermore, the district court held, contrary to established law, that fishing by non-Indians is a mere privilege, not a right, and as such is revocable at will. The significance of this questionable premise in the framing of the court's decree is that it facilitates the restriction and curtailment of the non-Indian's fishing rights and his access to the common fishery in state waters, with total impunity and, we submit, without regard for constitutional protections.

The premise that a citizen's right to fish is a mere privilege is erroneous. *Martin v. Lessee of Waddell,* 16 Pet. 367 (1842); *Smith v. Maryland,* 18 Howard 71 (1855); *McCready v. Commonwealth of Virginia,* 94 U.S. 391 (1877); *Geer v. Connecticut,* 161 U.S. 519 (1896); *Toomer v. Witsell,* 334 U.S. 385 (1948); *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948). See also: *Department of Game v. The Puyallup Tribe,* 414 U.S. 44 (1973). Furthermore, there is nothing in the language of the treaties, the record or the findings of fact to indicate any intent to treat the non-Indians' right to fish "in common" as inferior to the Indians or to permit the Indians to impose or require

restrictions on non-Indian fishing activities in the ceded territory. If anything, the record indicates that such positions were contrary to the understandings and cultural concepts of both parties to the treaties.

The district court then held that *in addition* to the 50%, the Indians are also entitled to: 1. all the salmon they catch on their reservations; 2. all they catch for ceremonial purposes; 3. all they catch to eat; 4. all they catch as participants in the all-citizen fishery whether on or away from their usual and accustomed grounds and stations; plus 5. an "equitable" adjustment for the number of fish caught by non-Indians outside the jurisdiction of the state of Washington.

The Court of Appeals for the Ninth Circuit did not rule on the propriety of the district court's holding that the words "in common with", as a matter of law, entitled the Indians to 50% of all harvestable salmon and steelhead plus the various additional allotments. The court of appeals instead went off on a theory of its own creation. It analogized the treaty language to a cotenancy in the fish and the litigation to a request for a partition. This application of "ownership" principles is totally foreign to cultural concepts and understandings of all parties to the treaties as established by the district court's findings of fact. Furthermore, the court of appeals failed to apply the same theory and standards of accountability to the Indians with regard to their fishing activities—particularly away from the usual and accustomed grounds and stations.

Ultimately, the court of appeal's decision rests upon a purported affirmance of the district court's exercise of "discretion" so as to "best protect the interests of all parties, as

well as those of the public". In fact, the district court did not, and did not purport to, exercise any discretion—it ruled as a matter of law, based on a misapplied interpretation of a definition in an 1828 English language dictionary, as to the meaning of the treaties. Nor did the district court at any time consider, balance or protect the interests of the non-Indians, the public, the State, or the Nation. Aside from a paternalistic mention in Finding of Fact 29 that "fishing is also important to some non-Indians" (R. 1601) the findings of fact and opinion basically ignore the circumstances of the 99.72% of the citizens in the case area who are not Indians. Nowhere in the findings of fact or opinion—which deal at great length with the importance of salmon to the Indian—is there any analysis of the importance of the salmon to the non-Indian or of the impact of the mandated closures and restrictions upon the non-Indian. There is no word that the Pacific salmon is a treasured public resource, the most valuable fishery in the United States, of all floating fish; no word that the Pacific salmon is a subject of intense international competition with aggressive fishing competitors as Japan, Russia and Korea, requiring the enterprise of American fishermen and sensitive international compacts, all exerted in our national interest.

The granting of a permanent 50% plus ownership in anadromous fish to tribal members is necessarily arbitrary and illogical. A quantified ownership bears no relationship to the number of Indians who actually fish, of all Indians, or to the number of Indians who fish compared with the number of non-Indians who fish, or to the number of Indians who fish now as compared to in 1855, or to the importance of fish in their livelihood now as compared to

in 1855 or to any other standard. If but one single Indian remained he would still have a hereditary right to 50% plus of all fish in his ancestral fishing grounds, whether he fished or not. The fallacy here lies not in the selection of any particular percentage. It lies in deciding this question in terms of *any* permanent percentage, and in interpreting the language of the Stevens treaty in terms of ownership concepts which are foreign to the treaty language, established law and Indian cultural concepts.

It is significant to note that neither the district court nor the court of appeals analyzes this result from the standpoint of equal protection principles which this Court has recognized as being required in the application of the specific language and treaties now before this Court.

> ". . . [We] add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with'" *Puyallup Tribe v. Department of Game*, 391 U.S. 392 at 403 (1968).
>
> "The case was remanded for determination of . . . 'the issue of equal protection implicit in the phrase "in common with"' as used in the Treaty.
>
> * * *
>
> "What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steel head that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when the nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.
>
> "The aim is to accommodate the rights of Indians under the Treaty and the *rights of other people.*" (Emphasis supplied) *Department of Game v. Puy-*

allup Tribe, 414 U.S. 44 at 45, 48-49 (1973).

This case presents a classic example of adding wholly new provisions to an Indian treaty to ameliorate a claimed injustice. This Court has repeatedly held that such interpolations are improper. In *Choctaw Nation of Indians v. United States*, 318 U.S. 423 (1943), this Court, after acknowledging the liberal view of interpretation relied on below, went on to say, in reversing the lower court decision which was based upon "findings" of Indian intent:

> "But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. (Citing cases) . . ." 318 U.S. at 432.

Also:

> "But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as an injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the government . . . to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe, a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law." *United States v. Choctaw Nation*, 179 U.S. 494 at 532-533 (1900).

Also:

> "But the context shows that the Justice meant no

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more than the language should be construed in accordance with the tenor of the treaty. That, we think, is the rule which this court has applied consistently to Indian treaties. We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for Congress." *Northwestern Band of Shoshone Indians v. United States,* 324 U.S. 335 at 353 (1945).

2.

The Interpretation and Application of the Treaty, As Affirmed by the Court of Appeals, Is Unconstitutional

The Constitution of the United States is of course binding upon all branches of the government—legislative, executive and judicial. There is no doubt that treaty provisions must comply with or give way to the provisions of the U.S. Constitution:

> ". . . It would not be contended that it [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of its states. . . ." *Geofray v. Riggs,* 133 U.S. 258 at 267 (1890).

> ". . . There is nothing in this language [the Supremacy Clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. . . ." *Reid v. Covert,* 354 U.S. 1 at 16 (1957).

The judgment and order in the case before this Court effectively deny non-Indian fishermen in the State of Washington constitutionally protected rights. Citizens and residents outside the State of Washington continue to assert and exercise, on a non-discriminatory basis, their right to exploit the common fisheries in Washington waters.

Salmon off the western coast of the United States run in mixed stock—salmon caught in the ocean off the State of Washington are returning to spawning streams in California, Oregon, Washington and Canada. Conversely, salmon returning to spawning streams in the State of Washington are caught in ocean waters off the coasts of Alaska, Oregon, California and Canada by citizens and residents of those states and that nation. Citizens and residents of Alaska, Oregon and California continue to enjoy their right to fish off the coast of Washington and to catch Washington spawned fish off the coasts of the other states.

On an argument raised for the first time some 120 years after the signing of the treaties, based upon a unique and arbitrary interpretation of treaty language, the citizens and residents of the State of Washington are now judicially restricted from equally exercising those same rights. As to these citizens and residents, there now exists a discriminatory restriction upon their use of the common fishery in order to make a permanent allocation of over 50% of the state's fisheries resources to a small (0.28%) ethnic minority of the citizens of the state.

This is so in spite of the precept that all citizens of the state have:

> "... a liberty of fishing in the sea, or creeks, or arms thereof, as a public common of piscary, and (may) not, without injury to their right, be restrained of it. ..." *Martin v. Lessee of Waddell,* 16 Pet. 367 at 412 (1842).

Nowhere in the Enabling Act of February 22, 1889, 25 Stat. 676, under which Washington became a state, do the citizens disclaim or surrender their rights to exploit the

common fisheries, particularly of the marginal seas.[2] Furthermore, that Enabling Act declares that:

> ". . . the proposed states . . . shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States from and after the date of said proclamation." (Section 8)

The right of all citizens to exploit the common fisheries in the marginal seas has remained fully effective and recognized by the Supreme Court. This right is also subject to the protection of both Art. IV, Section 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the Several States") and the Fourteenth Amendment of the U.S. Constitution, which states:

> "Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person the equal protection of the law".

Two significant decisions applying the Privileges and Immunities Clause of Article IV and the Fourteenth Amendment to rights of commercial fishermen are: *Toomer v. Witsell*, 334 U.S. 385 (1948); and *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

In *Toomer* the Court held:

> "[W]e hold that commercial shrimping in the marginal seas . . . is within the purview of the privileges and immunities clause . . ." 334 U.S. at 402-403.

In *Takahashi*, the plaintiff challenged a California statute which denied plaintiff the right to a commercial fishing license because, although he was a long-time resident and had been a commercial fisherman for 27 years, he

2. They disclaimed only title to the *lands* reserved to the Indians (Section 4, Second).

was "a person ineligible to (United States) citizenship." The Court struck down the statute as being an unconstitutional deprivation of rights in violation of the Fourteenth Amendment. The Fourteenth Amendment means that all persons lawfully in this country shall abide in any state on an equality of legal privileges with all citizens under non-discriminatory laws.

> "[Its supposed "ownership" of the fish] is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing . . . while permitting all others to do so." 334 U.S. at 421.

It is to be noted that the treaty before the court, by use of the word "in common with", itself repudiates the idea that it was intended to, or could, create discriminatory classifications.

At least since the adoption of the Fourteenth Amendment in 1865, and certainly since the enactment of the Indian Citizenship Act (43 Stat. 253), the Indian inhabitants of Washington have not only had the right to fish at their usual and accustomed places and on their reservations, but have also had the right to participate freely and equally with non-Indians in the common fishery on marginal seas. As noted, inhabitants of other states have also exercised rights to fish in the marginal seas of their states and in Washington waters, and, as the lower court recognized and found, they catch substantial numbers of salmon outside of Washington waters and jurisdiction which would otherwise have been available to inhabitants of this State. (F.F. 185, p. 102, R. 1680.) Salmon, being an anadromous fish, is no respector of state boundaries and fishermen fishing the marginal seas (Indian and non-Indian alike)

catch salmon running in mixed stocks which would otherwise return to a number of different states or to Canada. (Ex. JX-2a, figures 7 and 8, pp. 00241, 00242)

Under the lower court's ruling, the State is *required* to enact and enforce discriminatory regulations against 99.72% of the population in the case area. The State is to be *forced* to allocate the resources of this 99.72% of its citizens and expend them to place a monopoly control of well over 50% of its harvestable fish in the private hands of a 0.28% ethnic minority of its citizens. In addition, the State is required to permit this ethnic minority to compete freely with the other 99.72% of the citizens in exploiting the fishery at other than Indian's traditional fishing place, and if "a tribal member fishes in the all-citizen fishery at a location which is not a usual and accustomed ground or station of his tribe, that individual's catch will not count toward the tribal off-reservation share." (Ruling on Post-Decision Motions, Exhibit A, p. 3.) The lower court holds 11 state statutes and numerous state regulations void as applied to the Indians, while they must continue to be enforced against non-Indian fishermen.

In short, under the lower court's treaty interpretation and rulings, which are strained and unnecessary in the first place, non-Indians in this state are deprived of privileges and immunities held by other citizens and deprived of the equal protection of the laws with regard to their access to and utilization of the common fisheries on the marginal seas.

A further error in the decision below lies in the persistent failure to distinguish between the power of the federal government to prevent a state from interfering with a

treaty, and the lack of power to require a state to appropriate its resources to *implement* a federal treaty. Our research discloses no text or case authority that under the American Constitutional system the federal government, speaking through a treaty or speaking through a district court, can order a state to allocate its resources discriminatorily to discharge a federal treaty promise, particularly where, as here, the resource is not owned by the state in a proprietary sense, but as a custodian for its citizens as a whole. ". . . [T]he ownership is that of the people in their united sovereignty. . . ." *Geer v. Connecticut,* 161 U.S. 519, 529 (1896).

This concept may be tested by example. Of course, the Washington Departments of Fisheries and Game and the state's fish management activity rest solely upon the declaration of the citizens of Washington, expressed in legislation, that these are worthwhile activities. The state has no inherent responsibility to propagate or manage fisheries apart from statute. If the people of Washington through their legislature were to reconsider the worth of these measures, repeal these statutes and withdraw appropriations from Fisheries and Game, with the result that Washington salmon runs were overfished to the point of extinction, it could not lie within the competence of a federal district judge to sign an injunction ordering the re-enactment of these laws, appropriation of moneys, and subsequent executive administration of the laws in the way which that court feels will effectuate his interpretation of a treaty.

It cannot be argued that the decision and orders below do not constitute a reallocation of this resource. The court

orders that the tribes be given preferential rights up to 50% of the harvestable fish, plus reservation and subsistence catches and an "equitable adjustment," and orders that the state and its administrative officers withdraw these fish from the non-Indian fishermen.

This analysis would apply even if it were conceded that the Stevens treaties have the meaning ascribed to them in Final Decision #1. Indeed, if the plaintiff tribes and the court below were correct in their interpretation of the treaty language, the solution could still not constitutionally lie in the direction of issuing orders to the state of Washington mandating the state to give the Indians this public state resource. The remedy for an alleged broken federal promise is federal compensation.

3.

Other Issues Raised By Parties

Amici curiae will not discuss in detail other issues raised by petitioners because the ramifications of these issues and the need for review by this Court is well stated in the petitions. However, we suggest that two of the issues presented by this case are of unusual public significance and particularly merit review.

First, the unsettling impact of the decision below upon the treaties between Canada and the United States regulating the Fraser River sockeye and pink salmon fisheries, and upon the operations of the International Pacific Salmon Fisheries Commissions, is of great public importance.

Second, the unsettling effect of the newly created dual sovereignty between the State of Washington and the numerous Indian Tribes with respect to the salmon fishery,

together with the district court's continuing role as the supreme fisheries administrator, presents a problem of most serious and continuing concern. Both issues transcend in their public importance the bare question of treaty fishing rights.

CONCLUSION

It is believed that this is one of the most important Indian treaty cases to be presented to this Court. A full review by this Court is necessary not only to correct errors on substantive issues but also to re-establish rights of non-Indian citizens and to re-establish the State of Washington in its proper role in the management and conservancy of a sensitive public resource. *Amici curiae* urge this Court to grant certiorari on all three petitions. We respectfully urge the Court to order the parties to supplement the record with all of the proceedings before the district court since its initial decision so that the issues and ramifications can be fully understood.

We also respectfully request that *amici curiae* be permitted to present a brief on the merits following the grant of certiorari.

Respectfully submitted,

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